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No. _____

IN THE

Supreme Court of the United States

October Term, 1996

DIANA E. GARCIA
Petitioner

v.

MARVIN T. RUNYON, JR.,
POSTMASTER GENERAL, and the
UNITED STATES POSTAL SERVICE
Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED FOR REVIEW

Pregnant women in the U.S. Postal Service are generally not allowed to train for the highly desired position of window clerk, because the Service requires them to be able to lift, without assistance, objects weighing up to 70 pounds, and most pregnant women have a medical restriction against lifting anything heavier than 50 pounds. The 70-pound lifting requirement is not a formal, written requirement of the position itself. Petitioner was eight months pregnant and under the 50-pound lifting restriction when she bid successfully on a window clerk position, but the Postal Service took it away from her because of its lifting requirement. The following questions are presented:

1. Was there any business justification for the disparate impact of the above policy?

2. Does an arbitrator's decision that the above employer conduct is required by a labor agreement automatically insulate the employer from disparate treatment liability?

3. Does a case like the above become completely moot if the employer offers the employee, two and a half years after the fact and while litigation is pending, a position similar (but not identical) to the one previously withheld, while the employer continues to follow the discriminatory practice and the employee herself remains subject thereto?

4. Was the Court of Appeals' disposal of the foregoing issues without any opinion, 4 days after oral argument, such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's supervisory power?

LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Fifth Circuit are listed in the caption.

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OPINIONS BELOW

The District Court made findings of fact and conclusions of law, reproduced in the Appendix, but which were unreported. The Court of Appeals summarily affirmed without even a written opinion. 106 F. 3d 397 (Table) The summary affirmance and denial of rehearing both appear in the Appendix.

BASIS FOR JURISDICTION

The judgment sought to be reviewed was entered on January 10, 1997. Petitioner's timely motion for rehearing was overruled on February 13, 1997. Both of these judgments are reproduced in the Appendix. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title VII of the 1964 Civil Rights Act (42 U.S.C. § 2000e-2) provides as follows:

> (a) It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . sex . . .; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would

> deprive or tend to deprive any individual of employment opportunities or otherwise affect his status as an employee because of such individual's . . . sex . . ."

In 1972, Congress enacted 42 U.S.C. § 2000e-16 making Title VII applicable to Federal employment:

> "All personnel actions affecting employees or applicants . . . in the United States Postal Service . . . shall be made free from any discrimination based on. . . sex. . ."

In 1978, Congress added 42 U.S.C. § 2000e(k) providing as follows:

> "(k) The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . ."

STATEMENT OF THE CASE

In January of 1991, Petitioner Diana Garcia worked as a distribution clerk and mail sorting machine crew member, a job with substantial formal physical requirements, including the ability to lift up to 70 pounds. Eight months pregnant at the time, she was under doctor's orders not to lift anything heavier than 50 pounds, a restriction which the Postal Service had no difficulty accommodating. She bid successfully on and was awarded a job as a window clerk, a job with no formal physical

requirements whatsoever. However, when Mrs. Garcia appeared *in person* to schedule her training, the responsible officer at Personnel observed her obviously pregnant condition and asked whether she was on light duty. The Postal Service subsequently denied her the transfer, even though she was the senior bidder.

The only justification which the Postal Service has ever offered for its conduct is a Memorandum of Understanding (MOU) with the American Postal Workers Union (the Union). The MOU disqualifies somebody from changing jobs only if she is "not physically capable of" undergoing the necessary training.[1] The training consists of two weeks of classroom instruction and one week of on-the-job training (OJT), performing the duties of a window clerk while standing next to a supervisor. Once the OJT is finished, the MOU gives a physically limited person 12 months in which to recover sufficiently to perform all the duties of the position. The latter provision is irrelevant for window clerks, who have no physical requirements and who frequently are permanently disabled from heavy lifting.

Nevertheless, the Postal Service has successfully argued in this case that "physically capable of" undergoing window clerk training means physically capable of lifting, without assistance, a 70-pound package, which is the heaviest object that can be sent through the U.S. mail. The effect of this interpretation is to disqualify from window clerk training

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1 Appendix, p. 5a, n. 3.

substantially all pregnant women because of their universal restriction against lifting objects heavier than 50 pounds. Mr. William Burrus, who negotiated and signed the MOU as Executive Vice President of the Union, testified that the Postal Service was misinterpreting the MOU and that he would not have signed an agreement expressly containing a 70-pound lifting requirement for window clerk trainees because of the obvious disparate impact on pregnant women.

The Postal Service in the courts below has offered two different business justifications for its discriminatory policy: the supposed need to assess a trainee's ability to handle 70-pound packages; and the fact that a trainee ties up two jobs during the training period, her old one and the one for which she is training, hereinafter called the "dual incumbency" problem. However, witnesses for the Postal Service admitted that a trainee might not encounter a package heavier than 50 pounds during her week of OJT and that no special effort was made to include this as part of the training. Other uncontroverted evidence showed that mailed items heavier than 50 pounds are extremely rare, that window clerks often have permanent disabilities against heavy lifting, and that the Postal Service permits and encourages its employees to help each other with heavy objects. There was no showing of how the dual incumbency problem could be alleviated by creation of a 70-pound lifting requirement for window clerk trainees, since any employee, pregnant or otherwise, ties up two jobs during the training period.

Mrs. Garcia initially filed both an administrative complaint of pregnancy discrimination and a grievance under the Collective Bargaining Agreement. The grievance went to an arbitrator, who ruled that the Postal Service had correctly interpreted the MOU, but without resolving any of the discrimination issues. The pregnancy discrimination complaint, alleging discrimination under both the disparate treatment and the disparate impact models, eventually made its way to the United States District Court for the Western District of Texas, which had jurisdiction under 42 U.S.C. § 2000e-16 and 28 U.S.C. § 1331. The District Court ruled that the arbitrator's decision was binding on the Court and constituted a complete defense to the disparate treatment claim. The District Court further found that the MOU, as interpreted by the Postal Service, did have a disparate impact on pregnant women, but that it was justified because of the dual incumbency problem.[2]

In the ensuing appeal, the Postal Service did not attempt to argue dual incumbency as a business justification. Instead, it relied almost exclusively upon the mootness argument discussed in Part 4 of the next section. The lack of any written opinion by the Court of Appeals makes it impossible to know what that Court decided. However, the Postal Service is currently using the District Court's opinion to continue applying the MOU in the same discriminatory fashion that it did against Mrs. Garcia.

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2 Appendix pp. 10a - 13a.

REASONS FOR GRANTING THE WRIT

1. Even though the decisions below are unreported, they have a very substantial impact because of their applicability to all women employed by one of the nations's largest employers.

The United States Postal Service had about 875,000 employees in 1995.[3] Even if women constitute only about a third of that work force, that means roughly 300,000 women are working subject to the Postal Service's discriminatory interpretation of the MOU. The effect of the decisions sought to be reviewed is to tell all of these women who might want to change jobs within the Postal Service either not to get pregnant, or if they do, not to safeguard their health by getting a medical restriction against heavy lifting.

The only reason for letting such a blatant injustice go unrequited is that it is unreported. This Court might vacate and remand summarily any published decision of a Court of Appeals which accepted the arguments made by the Postal Service in this case. There should, nevertheless, be some limits to what is acceptable, even without creating harmful precedent.

Ideally, court decisions should produce justice, as most people understand the term. If that's not possible, a court decision should at least make a modicum of sense and do as

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3 Source: Reference librarian, El Paso Public Library.

little harm as possible. None of that has happened in this case. The system has malfunctioned, perhaps through human error, to the potential detriment of thousands of women.

2.Acceptance by the lower courts of "dual incumbency" as a business justification sufficient to overcome disparate impact conflicts with relevant decisions of this Court.

This Court has made clear the necessity of a substantial business justification for a practice that has a disparate impact on a protected group. Wards Cove Packing Co. Inc. v. Atonio, 490 U.S. 642, 659-660, 109 S.Ct. 2115, 2126, 104 L.Ed.2d 733 (1989). If the employer produces evidence of a substantial business justification, the employee may still prevail by showing that other tests or selection devices, without a similarly undesirable impact, would also serve the employer's legitimate interests. Id., at pp. 660-661 and 2126-2127.[4]

The decisions of the courts below conflict irreconcilably with Wards Cove. The employer in this case simply presented no evidence of substantial business justification or legitimate interest. The Postal Service said it had to disqualify pregnant women from training for its most desirable jobs because, during the training period, the women would tie up two jobs. However, dual incumbency applies to everybody, not just pregnant women

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4 Effective November 21, 1991, the President signed into law Section 2000e-2(k)(1)(A) of Title 42, United States Code, reallocating the burden of proof from the employee to the employer. The operative facts of this case occurred before the effective date of that amendment.

and others temporarily disabled from lifting more than 50 pounds. A champion male power lifter, able to lift 400 pounds all by himself, would still occupy two jobs while training to be a window clerk. The only way to solve the dual incumbency problem would be to bar from window clerk training all persons currently employed by the Postal Service. The "business justification" offered by the employer is patently frivolous and its "legitimate interest" is non-existent.

Viewed another way, the facts of this case might present an important issue not addressed by this Court in Wards Cove: what happens when the employer's legitimate interest is unattainable? The Postal Service says it needs to discriminate against pregnant women to prevent dual incumbency. That problem cannot be avoided if people are to be promoted to the position of window clerk from within the Postal Service. It is absolutely impossible for somebody in Mrs. Garcia's position to show some other policy which could prevent dual incumbency.

If the objective were to prevent injury to pregnant women and disabled persons, Mrs. Garcia could point to the supervisor, standing right by her side during training, and say that getting help from that source would be better than disqualifying her. Protection of women as a business justification would, of course, fly in the face of this Court's decision in International Union UAW v. Johnson Controls, 499 U.S. 187, 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991).

The problem with dual incumbency as a business justification is that it simply does not make any sense. It's like saying that window clerks have to be able to lift 70 pounds for security reasons. The 70-pound lifting requirement has no more to do with dual incumbency than it does with security. It is a justification that is so fanciful and so obviously contrived that it not only fails to justify a discriminatory policy, but seems to be evidence of intentional discrimination under the guise of the policy.

3. The lower courts' giving preclusive effect to the arbitrator's decision on the disparate treatment claim conflicts with relevant decisions of this Court.

This Court has explicitly recognized that a facially neutral employment practice can be a pretext for intentional discrimination. Wards Cove, 490 U.S. at 660, 109 S.Ct. at 2126; Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 999, 108 S.Ct. 2777, 2790-2791, 101 L.Ed.2d 827 (1988). The facts of the instant case are doubtless the sort of thing this Court had in mind as a disparate impact so egregious that it suggests disparate treatment. However, the District Court below avoided making the almost inevitable finding of disparate impact by deferring to the arbitrator:

> "The arbitrator's decision in favor of the Postal Service 'is sufficient to carry the employer's burden of articulating some legitimate, non-discriminatory reason for its actions.' [Citations

> omitted] Further, the arbitrator's decision is binding on all parties to the extent that it resolves questions of contractual rights. [Citation omitted] The courts must give due deference to precedential arbitration decisions applying to the parties' interpretation of their own collective bargaining agreement. [Citation omitted] Accordingly, the Postal Service has articulated a legitimate, nondiscriminatory reason for its action, and the decision of the arbitrator regarding the agreement between the Postal Service and the Union is binding upon this court."[5]

Neither of the courts below attempted to distinguish this Court's decision in Alexander v. Gardner-Denver Company, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), in which this Court held that employees subject to collective bargaining agreements may pursue discrimination claims under such agreements without prejudice to their rights under Title VII. 415 U.S. at 46-52, 94 S.Ct. at 1019-1021. That core holding clearly survived this Court's later decision in Gilmer v. Interstate Johnson/Lane Corp., 500 U.S. 20, 111 S.Ct. 1647, 147 L.Ed. 2d 26 (1991).[6] The continuing viability of Alexander was re-emphasized by this Court less than three years ago. Livadas v. Bradshaw, 512 U.S. 107, 114 S.Ct. 2068, 2080, n. 21 (1994).

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5 Appendix, p. 10a - 11a (emphasis supplied).

6 See 500 U.S. at 33-34, 111 S.Ct. at 1656.

There were also more practical reasons why the arbitrator's decision should not have been considered a complete defense to discrimination on the disparate impact model. It did not even exist at the time the discriminatory acts occurred. Furthermore, the arbitrator expressly stated that he was not resolving any discrimination issues. Finally, the arbitrator did not hear the same evidence as the District Court, especially the testimony of the union official that management was misinterpreting the MOU.

4. To the extent that the Court of Appeals may have accepted the Postal Service's mootness argument, its decision conflicts with relevant decisions of this Court and those in three other Circuits.

The Postal Service's defenses in this case could hardly have been weaker. Even if the arbitrator's after-the-fact decision somehow trumped Mrs. Garcia's virtual lay-down-hand proof of disparate treatment, the decision afforded them no help on her disparate impact claim. The Postal Service had no defense at all for gratuitously interpreting the MOU's requirement to be physically capable of training to mean physically capable of lifting up to 70 pounds without assistance, which was not a requirement of the job itself. This no doubt explains why the Postal Service in the Court of Appeals relied almost exclusively on a mootness argument.

Mrs. Garcia eventually did become a window clerk. This

happened about two and a half years after the occurrences giving rise to this suit and while suit was already pending. Both the location and the hours of the position she finally won were less desirable than the position she had lost two and a half years before.

The day before trial, the Postal Service first raised this mootness defense in the pre-trial order, and this has been its main defense in all of its succeeding filings and arguments in the courts below. The District Court ignored the mootness issue in its findings of fact and conclusions of law. The Postal Service renewed this argument in the Court of Appeals, which affirmed without any opinion at all. It is therefore impossible to determine whether the Court of Appeals accepted it. If it did, its decision is in conflict with controlling precedent from this Court and several other Courts of Appeals.

This Court long ago established that the mootness defense has two essential elements:

> "(1) It can be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur, [citations omitted], and
>
> "(2) Interim relief or events have completely and irrevocably eradicated the effects of the alleged violation [citations omitted].

> "When both conditions are satisfied, it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law."

County of Los Angeles v. Davis, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979)(emphasis supplied).

There certainly is no assurance here that the alleged violation will not recur, because Mrs. Garcia continues working subject to the policy. If she wants to transfer to another job requiring training, she had better not apply while pregnant. Furthermore, the effects of the violation have not been "irrevocably eradicated," because Mrs. Garcia received a less desirable position than the one previously taken away from her. Finally, the mootness defense is not applicable unless "neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law." The Postmaster General certainly has a legally cognizable interest, of a sort, in the District Court's erroneous conclusion that there was a business justification for the discriminatory policy. That decision leaves the Postmaster General free to continue applying his discriminatory policy to the hundreds of thousands of women in his employment.

The most recent Court of Appeals decision has quite reasonably held that a case becomes moot only if the plaintiff

receives all of the relief she is entitled to, including the correct amount of back pay, as well as attorney's fees. Ryan v. City of Shawnee, 13 F.3d 345, 350 (10th Cir. 1993). Another court has held that a sexual harassment claim is not mooted by transfer of the plaintiff away from the harasser, because of the availability of equitable relief and attorney's fees. McKinney v. Dole, 765 F.2d 1129, 1140 n. 25 (D.C. Cir. 1985). A Title VII case based on denial of a position does not become moot even if the plaintiff gives up and joins the Army. Ward v. Arkansas State Police, 653 F.2d 346, 350 (8th Cir. 1981). Even a change during the lawsuit of a challenged discriminatory policy does not moot the claims of employees already affected by it. Zichy v. City of Philadelphia, 590 F.2d 503 (3rd Cir. 1979).

Mrs. Garcia asked the courts below to afford her various kinds of relief, not just the next window clerk job for which she happened to be the senior bidder. She asked that she get the same job with the same location and the same hours as the one taken away from her. She requested monetary relief to make up for the delay in becoming a window clerk and the differences between the position she wanted and the one she got. She also asked for the full panoply of equitable relief available under 29 C.F.R. § 1614.501, as well as her attorney's fees. She did not get any of that, which doubtless explains why the District Court did not hold the case to be moot. Nevertheless, the Postal Service has apparently prevailed in its mootness argument at the Court of Appeals level, which is completely inconsistent with all decisions on the subject rendered by this or any other Court of Appeals.

5. The refusal by the Court of Appeals to give any reasons for its decision is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

The Court of Appeals affirmed without a written opinion four days after hearing oral argument.

The Fifth Circuit is one of four Courts of Appeals in which appellants do not have a right to even a complete sentence disposing of their cases.[1] Its Local Rule 47.6 seems to limit the Court's power: there must be no reversible error of law, no unsupported factual findings, no genuine issue of material fact (in the case of summary judgments), and no precedential value in the case. Of course, every affirmance, even a 100-page opinion, is based on one of the deficits set out in the Rule. The only thing that takes a 47.6 case out of the ordinary is absence of precedential value.

Do Courts of Appeals have unlimited power in this area? If so, then the review process at the Court of Appeals level is no different from petition for certiorari in this Court. If, on the other hand, there are <u>any</u> limits on this power, they have surely been exceeded in this case. It is difficult to see how this decision could have no precedential value to the Postal Service and no

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1 Cf. Eighth Circuit Rule 47B, Tenth Circuit Rule 37.1, Eleventh Circuit Rule 36-1.

precedential impact on the hundreds of thousands of women who work there. At the very least, the decision in this case broke important new ground on the interplay between disparate impact and disparate treatment and has wiped 23 years of recently reaffirmed Supreme Court precedent about the delicate balance between the powers of arbitrators and courts. Two distinguished organizations, the National Organization for Women and the San Francisco Legal Aid Society, underscored the significance of this case by filing amicus briefs in the the Court of Appeals.

Affirmance without opinion has recently come in for strong academic criticism.[2] District Courts are flatly prohibited by F.R.C.P. 52(a) from deciding cases in this manner. That Rule, in effect, guarantees the right of trial, because a decision with no supporting reasons is really no decision at all. Affirmance without opinion, by the same token, effectively takes away the right of appeal.

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2 See, e.g., Baker, Thomas E., Rationing Justice on Appeal (Justice Research Institute, 1994), p. 121 ("A Fifth Circuit 'innovation,' the practice is anathema to the appellate idea and the tradition of the federal courts . . .")(footnote omitted). See generally: Tobias, Carl, *The New Certiorari and a National Study of the Appeals Courts*, 81 Cornell L.Rev. 1264 (1996); Klover, Kerri L., Comment, *"Order Opinions" — The Public's Perception of Injustice*, 21 Wm. Mitchell L. Rev. 1225 (1996); Horton, Elizabeth M., Comment, *Selective Publication and the Authority of Precedent in the United States Courts of Appeals*, 42 UCLA L.Rev. 1691 (1995); Dragich, Martha J., *Will the Federal Courts of Appeal Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 Am.U. L.Rev. 757 (1995); Songer, Donald R., *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 Judicature 307 (1990).

CONCLUSION

It is respectfully submitted that, for the reasons outlined above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

/s/ Mike Milligan

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-50024

DIANA E. GARCIA,
Plaintiff-Appellant,
versus
MARVIN T. RUNYON;
THE UNITED STATES POSTAL SERVICE,

Defendants-Appellees.

Appeal from the United States District Court
For the Western District of Texas
(EP-93-CV-189)

Before HIGGINBOTHAM, SMITH, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 47.6.*

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-50024

DIANA E. GARCIA
Plaintiff-Appellant
v.
MARTIN T. RUNYON;
THE UNITED STATES POSTAL SERVICE
Defendants-Appellees

U.S. COURT OF APPEALS
FILED
FEB. 13, 1997
CHARLES R. FULBRUGE III
CLERK

Appeal from the United States District Court
For the Western District of Texas, El Paso
(EP-93-CV-189)

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, SMITH, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is *denied.*

ENTERED FOR THE COURT:

/s/ Emilio M. Garza
United States Circuit Judge

REHG-2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

DIANA E. GARCIA, **Plaintiff**	§	
	§	
	§	
v.	§	**EP-93-CA-189-DB**
	§	
MARVIN T. RUNYON, JR., **Postmaster General, United States Postal Service,** **Defendant.**	§	
	§	
	§	
	§	
	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On this day, the Court considered the above-captioned cause. Trial in this matter was before the Bench on August 3 and 4, 1995. Both parties filed written closing arguments on August 11, 1995. After due consideration, the Court is of the opinion that this matter be resolved as set forth below.

FINDINGS OF FACT

Plaintiff ("Garcia") began employment with Defendant ("Postal Service") as a clerk in June, 1986. In May, 1990, Garcia learned that she was pregnant. On August 13, 1990, Garcia applied for light duty which the Postal Service granted. On

November 15, 1990, Garcia submitted a bid for a position as a distribution/window clerk. On January 8, 1991, Garcia was designated the senior bidder for the distribution/window clerk position. In order to qualify for the distribution/window clerk position, a senior bidder must successfully complete a three week deferral/training session. This training period included approximately two weeks of classroom training followed by approximately one week of on-the-job training in the new position, under continuous direct supervision. On January 11, 1991, Garcia visited Irene Mendoza at the Postal Service Training Center to schedule her training period for the new position.[1]

On January 16, 1991, local Postal Service officials in the Human Resources Department declared Garcia to be ineligible for the distribution/window clerk position on the basis of a Memorandum of Understanding ("MOU") which was entered into between the Postal Service and Plaintiff's union ("Union").[2] Garcia's bid for the distribution/window clerk

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[1] Ms. Mendoza was the Employee Development and Training Specialist..

[2] American Postal Workers Union, AFL-CIO.

position was denied because local officials were notified that Garcia was working a light duty assignment, and would remain on light duty throughout the deferment/training period for the posted position. Based upon the MOU, the Postal Service concluded that Garcia was on light duty from September 7, 1990, to February 11, 1991, at which point she went on maternity leave, and she was therefore physically incapable of entering the deferment period. In making this decision, the Postal Service relied upon the MOU noted above.[3]

On May 30, 1991, Garcia filed a formal administrative complaint of discrimination with the Postal Service alleging that she had been subjected to discrimination, in violation of Title VII of the Civil Rights Act of 1964, on the basis of race, national origin, sex, and handicap (pregnancy).

---

[3] The Memorandum of Understanding reads in pertinent part:
If an employee is designated the senior bidder for an assignment which requires a deferment period, the employee must be physically capable of entering the deferment period at the time of the bid and completing it within the same time limits set forth in the applicable provisions of the National Agreement. Further, if the employee qualifies during the deferment period, the employee must be capable of immediately assuming the duties of the assignment in accordance with all of the provisions set forth in this Memorandum of Understanding. In accordance with this provision, if the assignment requires the demonstration of skill(s), the employee must be able to demonstrate the skill(s) on the closing date of the posting.

Pursuant to 19 C.F.R. § 1614, the Postal Service conducted an internal investigation. On October 17, 1991, the Postal Service issued Garcia a Proposed Notice of Disposition recommending a finding of no discrimination. Garcia requested a hearing before an administrative law judge of the United States Equal Employment Opportunity Commission ("EEOC") on the discrimination issues raised in her complaint. EEOC Administrative Law Judge John J. Lokas conducted a hearing on the matter on January 15, 1992. Judge Lokas issued a decision on June 25, 1992, in which he recommended a finding of no discrimination on the basis of either race or national origin, bud did recommend a finding of discrimination on the basis of sex and handicap.

Garcia also filed a grievance with the Union on the issue of whether the Postal Service violated the agreement between the Postal Service and the Union when the Postal Service declared her to be ineligible for the distribution/window clerk position. Impartial arbitrator Earnest Marlatt conducted a hearing on the issues raised in the grievance on March 13, 1992. On April 23, 1992, Mr. Marlatt rendered his decision, finding

that the Postal Service had not violated the terms of the agreement, and dismissed the grievance.

On August 28, 1992, the Postal Service issued its final decision rejecting the findings of Judge Lokas with regard to his recommended finding of discrimination on the basis of sex and handicap. The Postal Service again based its decision on the MOU.

On September 16, 1992, Garcia appealed the Postal Service's decision to the Office of Federal Operations ("OFO") of the EEOC. The OFO affirmed the Postal Service's decision, concluding that Garcia could not establish a *prima facie* case for any type of discrimination. On April 29, 1993, Garcia filed this action in the United States District Court for the Western District of Texas

CONCLUSIONS OF LAW

The United States Supreme Court recently articulated the burdens of proof regarding a Title VII discrimination case.

Those burdens are:

1. The plaintiff has the burden of proving by a preponderance of the evidence a *prima facie* case of discrimination.
2. If the plaintiff succeeds in proving a *prima facie* case, the defendant must articulate some legitimate, non-discriminatory reason for the adverse employment action.
3. If the defendant can articulate a legitimate non-discriminatory reason for its adverseemployment action, then the presumption raised by the *prima facie* case disappears and the plaintiff must prove that the non-discriminatory reason was false and that discrimination was the real reason.

St. Mary's Honor Center v. Hicks, ____ U.S. ____, 113 S.Ct. 2742, 2747-49 (1993); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973).

In order to establish a *prima facie* case for such discrimination, Garcia must establish (1) that she is a member of the class protected by Title VII; (2) she suffered adverse treatment or was denied an employment benefit or opportunity; and, (3) a similarly situated individual not of her protected group was treated more favorably. *McDonnell Douglas*, 411 U.S. at 802. *See also Norris v. Hartmarx Specialty Stores, Inc.*, 913 F.2d 253, 254 (5th Cir. 1990); *Thornton v. Nieman Marcus*, 850

F.Supp. 538 (N.D. Tex. 1994). Here, Garcia has established a *prima facie* case for discrimination by showing that (1) she is a member of a class protected by Title VII; (2) she was qualified for, applied for, and was denied an employment opportunity; and, (3) a similarly situated individual not of her protected class was treated more favorably.

Because Garcia has met her burden of establishing a *prima facie* case, the burden shifts to the Postal Service to articulate some legitimate, non-discriminatory reason for its actions. *St. Mary's Honor Center* at 2747-49. In this case, the Postal Service presented a legitimate, nondiscriminatory reason for its actions. Garcia was declared ineligible for the distribution/ window clerk position based upon the MOU between the American Postal Workers Union (of which Garcia is a member) and the Postal Service. The issue of proper construction of the MOU was decided by an arbitrator who ruled that the Postal Service's interpretation of the MOU was in fact correct. The MOU clearly required the successful bidder to be physically capable of entering the deferment period; Garcia was not.

The arbitrator's decision in favor of the Postal Service "is sufficient to carry the employer's burden of articulating 'some legitimate, non-discriminatory' reason for its actions." *Becton v. Detroit Terminal of Consol. Freightways*, 687 F.2d 140, 142 (6th Cir. 1928), *cert. denied*, 460 U.S. 1040 (1983), *citing McDonnell Douglas*, 411 U.S. at 802. Further, the arbitrator's decision is binding on all parties to the extent that it resolves questions of contractual rights. *Owens v. Texaco, Inc.*, 857 F.2d 262 (5th Cir. 1988), *cert. denied*, 490 U.S. 1046 (1989).[4] The courts must give due deference to precedential arbitration decisions applying to the parties' interpretation of their own collective bargaining agreement. *W.R. Grace & Co. v. Local 759*, 461 U.S. 757 (1983). Accordingly, the Postal Service has articulated a legitimate, non-discriminatory reason for its action, and the decision of the arbitrator regarding the agreement

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4 In *Owens*, the Court held that:
An employee may pursue fully both his right to arbitration under a collective bargaining agreement and his cause of action under Title VII, and the finding of the arbitrator with regard to discrimination issues are not binding on the court. *Alexander v. Gardner Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011 (1974). *However*, under the *Steelworkers Trilogy* (citations omitted), the arbitrable decision is final and binding to the extent it resolves questions of contractual rights. The employee may assert his independent statutory rights under Title VII but the arbitrator's interpretation of the contract status of the parties is controlling. *Owens*, 857 F.2d at 265.

between the Postal Service and the Union is binding upon this Court.

Once the Defendant has articulated a legitimate, non-discriminatory reason for its actions, the burden shifts back to the plaintiff to establish that the non-discriminatory reason was false and that discrimination was the real reason for its actions. In other words, the plaintiff must show that the reasons offered by the employer are a mere pretext for discrimination. *See St. Mary's Honor Center*, 411 S.Ct. at 2747-49. The ultimate issue of fact is whether the employer intentionally discriminated against the employee. *United States Postal Service v. Aikens*, 460 U.S. 711, 715 (1983). This is the point at which Garcia's argument fails. Garcia admitted that, in her opinion, the reason she was denied the distribution/window clerk position is that Ms. Mendoza misinterpreted the MOU. An employer is not required to prove that its decision was correct; it need only be determined that the employer acted in good faith and that the asserted reason was not a pretext for discrimination. *Moore v. Sears, Roebuck & Co.*, 683 F.2d 1321, 1323 (11th Cir. 1982). As a result, Garcia can not show that the Postal Service intended

to discriminate against her. *International Bhd. of Teamsters*, 431 U.S. at 325; *Armstrong v. City of Dallas*, 997 F.2d 62 (5th Cir. 1993).

Finally, Garcia has failed to show that the MOU, as applied, has a disparate impact on women. The seminal case involving disparate impact is *Wards Cove Packing v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). Under *Wards Cove*, a plaintiff must first establish a *prima facie* case that a facially neutral employment practice is nonetheless violative of Title VII. *Id.* Once a plaintiff establishes a *prima facie* case, the defendant must produce evidence of a business justification for its employment practice. Such a justification requires consideration of the justification offered by the employer for its use of the practice, and the availability of alternative practices to achieve the same business ends, with less impact. *Id.* at 2125. Garcia, once again, has established a *prima facie* case of disparate impact. However, that is not the end of the analysis.

The Postal Service articulated a legitimate business

justification for requiring the deferment period. A "senior bidder, pending qualification", which was exactly Garcia's status at the time she was designated senior bidder, is effectively one person with two jobs. The individual occupies the position from which he/she bid, plus the new job. The old job remains open so that it can be filled when the employee completes the required training and qualifies for the new job. Additionally, Garcia failed to show the availability of any alternative practices which would achieve the same business ends, with less impact. As a result, Garcia can not show that the Postal Service's interpretation of the MOU had a disparate impact on women.

Accordingly this Court finds that the Plaintiff has failed to establish a Title VII case for discrimination on the basis of race, national origin, sex, and handicap. It is therefore **ORDERED, ADJUDGED** and **DECREED** that **JUDGMENT IN THIS MATTER BE FOR THE DEFENDANT.**

SIGNED this 1st day of November, 1995.

s/s David Briones

THE HONORABLE DAVID BRIONES
UNITED STATES DISTRICT JUDGE